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STATE OF NEW JERSEY
Board of Regulatory Commissioners
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Celeste Fasone
Director

Office of Cable Television
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September 29, 1993

Hon. William F. Caton, Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: IN THE MATTER OF
MM DOCKET No. 92-266
FCC No. 93-428
IMPLEMENTATION OF THE
CABLE TELEVISION CONSUMER
PROTECTION AND COMPETITION
ACT OF 1992

Dear Mr. Caton:

Enclosed please find an original and 12 copies of the Staff Comments of the Board of Regulatory Commissioners for filing in the above matter. We have included copies for the Chairman, each Commissioner, Ms. Ellen Schned and Mr. Alan Aronowitz.

Kindly place the Board and the Office of Cable Television on the service list for this docket.

Thank you for your consideration.

Very truly yours,

Celeste M. Fasone

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Director

Enclosures

RW:am

STAFF COMMENTS
ON
NOTICE OF PROPOSED
RULEMAKING ON CABLE RATE REGULATION
ISSUED SEPTEMBER 2, 1993
COMMENT DUE SEPTEMBER 30, 1993
MM DOCKET NO. 92-266
FCC NO. 93-428

The Staff of the New Jersey Board of Regulatory Commissioners (Board) is pleased to submit these comments to assist the FCC (Commission) in the implementation of the Cable Act of 1992.

In these comments, the Board Staff will state its opinion on the four questions presented by the Commission in the Notice of Proposed Rulemaking published in the Federal Register on September 2, 1993.

In regard to Paragraph 1, seeking comment on methods to adjust capped rates because of addition or deletion of channels, Staff makes the following comments. The goals of protecting consumers from unreasonable rates while assuring the continued growth of the cable industry and the additional services that it can provide are the proper concerns in this issue. There is a fine line between two concerns that must be determined by adoption of the proper public policy and technical methodology, as recommended below. Further, the Staff wishes to note a distinction between adjustment for a limited number of channels of generally and readily available programming and the introduction of a larger number of channels or channels delivering new, innovative and customized channels or services, which may be included in basic or cable programming services. In a period of rapid technology change, radically new services such as interactive services are possible and must be considered at this time.

The Staff believes that in the former case, presuming that the initial rate has already been determined through a proper application of the benchmark by use of Form 393, the best methodology to achieve the stated goals is to add or subtract the actual cost of the added or deleted program as expressed on a cents per channel basis from the already determined benchmark rate. In the former case, no rate of return should be allowed to the operator. In the latter case, of major channel changes and/or introduction of new and innovative, customized programming increases. This actual cost methodology should be applied but a reasonable rate of return as recommended by the FCC range and finally determined by the local franchising authority should be added to the cost allowed in these cases. The parameters of the definition of customized or innovative programming should be left to the discretion of the local franchising authority, subject to review by the Commission.

In the alternative, of the three methodologies proposed in the NPRM, Staff agrees with the Commission that the third methodology is the most desirable. Here the new permitted per channel rate would be the existing permitted per channel rate adjusted up or down for programming expenses and further adjusted to reflect the same increase or decrease of the benchmark tables.

In regard to Paragraph 2, seeking comment for cost recovery for upgrades initiated shortly before rate regulation, Staff believes that no special concession or consideration be made for operators in this case. The operator should be given the same option - benchmark analysis or cost of service showing as other operators. The debate over regulation was lengthy and was no surprise to any operator initiating capital expenses for whatever reason. System upgrades are not an unexpected cost of operation in the cable business. The cost of service analysis option provides the operator with sufficient protection should costs actually be above the benchmark. Strict application of full cost of service requirement will eliminate extensive definition problems on what constitutes an upgrade, the reason for the upgrade, and the reasonableness of the cost of the upgrade. Another class of cable operators could be created, which was not envisioned in the Cable Act of 1992 itself, should special consideration to made for rate alternatives other than the benchmark/cost of service decision.

In regard to Paragraph 3, seeking comment on operator discretion to select benchmark rates or cost of service filing for different regulated tiers, Staff agrees with the tentative conclusion of the Commission. Namely, that cable operators should be required to elect either the benchmark or the cost of service approach for all regulated tiers. This was the Staff's reading of the Commission's rate Order adopted April 1, 1993. Allowing otherwise will create additional confusion in the industry and create a demand for another round of retiering time allowances to conform with a new interpretation. It is clear that requiring the same benchmark rate setting for basic service and cable programming service is a logical extension of the entire statistical basis on the benchmark process. The cost of service option is a "safety value" option, moving the cable operator out of the benchmark system entirely. The cost of service option was allowed for purposes of preventing constitutional challenges and allowing for protection for extraordinary costs of system operators to be reviewed on an individual basis.

The per channel benchmark rate is based on the key variables of number of subscribers, <u>total</u> number of operating channels and <u>total</u> number of satellite delivered channels on a system. Breaking up the method of analysis by introducing cost of service methodology to any piece appears to invalidate the entire benchmark (average price) methodology. The two methodologies are ultimately based on two different measures, price and cost, and can not be logically mixed.

Finally, any retiering to conform to the Cable Act of 1992 has already been done prior to September 1, 1993. Further retiering efforts on a large scale will create massive public confusion, further raising public dissatisfaction with the cable rate regulatory process.

In regard to Paragraph 4, seeking comment on cost recovery of upgrades required by local franchising authorities, the comments of the Board's Staff follow. Staff believes a dividing line must be formulated to separate large scale capital improvements involving major physical plant upgrades or rebuilds from lessor costs imposed by municipalities in the franchise renewal process. Increased office facilities and/or hours, certain line extensions or service improvements to local institutions such as schools or other public purpose facilities may be required as part of the franchise renewal process. These costs are relatively minor in relation to the total value of a cable operator's total plant. This type of locally required cost should be included as external costs for rate treatment. Staff recommends that these costs eligible for external cost treatment be capped at 5% of the total value of operator physical plant of 5% of total yearly expense whichever comparison is most applicable.

Costs above the 5% cap should be considered major capital improvements or rebuild expenses. The cable operator should be required to recover these expenses only in a normal cost of service proceeding, if the cable operator makes the business decision that benchmark rates are not sufficient. It should be noted that the survey on which benchmark rates were based was a large sample taken at a given period of time. This was a snapshot of the industry in an unregulated state. It can be reasonably presumed that a representative number of systems at that time were upgrading or rebuilding and were priced accordingly. These prices are then reflected in the benchmark rates.

Permission to automatically or in a streamlined manner recover such major upgrade or rebuild costs is not granted in the Cable Act of 1992 in any other way than a cost of service filing. To grant such a new mechanism would be to create new classes of cable operator not envisioned in the Cable Act of 1992.

The Commission lastly seeks comment on two alternatives for determining the adjustments to rates based on franchise required upgrade cost if the Commission does permit external treatment for these costs.

The Staff believes that the preferable alternative is that recovery of these costs should be governed by the strict cost of service standards recommended by the Board in prior comments to the Commission, namely, traditional rate base, rate of return methodologies based on original historic cost only. The Commission will issue its cost of service rulemaking in the future. These are the standards that should govern cost recovery in this instance. Such an approach will result in uniformity in the regulatory process.

The above recommendations apply for basic and all other regulated services. Consistent with other comments in the regard to Paragraph 3 in this rulemaking, namely, the cable operator should be bound in all regulated tiers, basic and otherwise to the same determination of regulatory method, benchmark or cost of service.

The Staff of the Office of Cable Television thanks the Commission for this opportunity to comment in this proceeding and thanks the Commission for its assistance in this difficult period.